

COLEMAN & BALOGH LLP
ETHAN A. BALOGH, No. 172224
EVAN C. GREENBERG, No. 271356
235 Montgomery Street, Suite 1070
San Francisco, CA 94104
Direct: 415.391.0441
Facsimile: 415.373.3901
eab@colemanbalogh.com

Attorneys for Defendant
BARBARA JOAN LOPP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
BARBARA JOAN LOPP,
Defendant.

Case No. 15 Cr. 373 YGR-KAW

NOTICE OF MOTION AND MOTION TO
SUPPRESS EVIDENCE; MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT

Date: February 25, 2016
Time: 2:00 p.m.

Before the Honorable Yvonne Gonzalez Rogers
United States District Judge

EVIDENTIARY HEARING REQUESTED

TO: BRIAN STRETCH, ACTING UNITED STATES ATTORNEY, and KELSEY
LINNETT, SPECIAL ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on February 25, 2016 at 2:00 p.m., or as soon thereafter as
she may be heard, defendant Barbara Joan Lopp, by and through her counsel, will and does
hereby move this Court to enter an Order granting the motion listed below.

MOTION

Barbara Joan Lopp, by and through her counsel, respectfully moves this Court pursuant to
the Fourth Amendment to the United States Constitution, the Federal Rules of Criminal
Procedure, and all other applicable case law and statutes for an Order suppressing all evidence
and fruits of evidence obtained from an unlawful stop and arrest conducted on February 12, 2015

1 by police officers of the Woodbury County Sheriff's Office and the Sioux City Police
2 Department, including but not limited to all statements made by Ms. Lopp and all physical
3 evidence obtained from her person and from the rental vehicle as a fruit of her unlawful detention
4 and arrest. This motion is based on the instant notice of motion and motion, the attached
5 memorandum of points and authorities, the Declaration of Ethan A. Balogh Filed January 21,
6 2016, the pleadings and Orders on file in the Clerk's Record, and any and all other materials that
7 may come to this Court's attention at the time of the hearing on this motion.

8 Respectfully submitted,

9 DATED: January 21, 2016

COLEMAN & BALOGH LLP

10 /s/ E A Balogh

11 By: ETHAN A. BALOGH
12 235 Montgomery Street, Suite 1070
13 San Francisco, CA 94104
14 Direct: 415.391.0441

15 Attorneys for Defendant
16 BARBARA JOAN LOPP
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

As the Court is aware, this case arises from defendant Barbara Joan Lopp's February 12, 2015 arrest in Sioux City, Iowa. *See* ECF Nos. 43, 54. In brief, officers from the Woodbury County Sheriff's Office ("WCSO") and Sioux City Police Department ("SCPD") detained and arrested Ms. Lopp on a hunch. Because, at the times they acted, the officers lacked legal cause to support her detention or arrest, her detention and arrest violated her Fourth Amendment rights. These violations necessitate suppressing the evidence, and fruits of the evidence, obtained as a result of the officers' unlawful actions. In this case, Ms. Lopp seeks suppression of all statements at her detention and thereafter, including recorded jail calls and police interviews, as well as the suppression of all physical evidence seized from her person and from the rental vehicle.

II. Facts¹

According to the WCSO and SCPD, on February 12, 2015, police officers detained and arrested Ms. Lopp in Sioux City, Iowa. The facts as presented by the reporting officers are not completely clear or consistent.

We begin with the report prepared by WCSO Deputy Michael Lenz. He reported that at an unspecified time on February 12, 2015, he "and Deputy Brand overheard Sioux City PD radio traffic on a male subject inside of a credit union on S. Fairmont that was possibly committing

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¹Ms. Lopp presents here the events as reported by the SCPD and WCSO. While she accepts those accounts *arguendo* for the purposes this memorandum, she reserves the right to contest the officers' narratives, and to present evidence demonstrating factual inaccuracies in those accounts. The reports produced by the Government are attached as Exhibits A and B to the Declaration of Ethan A. Balogh Filed January 21, 2016 ("Balogh Decl."). Although those reports direct the reader to review a report prepared by Deputy Brand, *see e.g., id.*, Ex. A at FBI 3561, FBI 3563, FBI 3566, and although Ms. Lopp requested the production of Deputy Brand's report(s), *see id.* ¶ 2, as of this filing, the Government has not yet produced any such report(s). *Id.* In addition, the Government has informed Ms. Lopp that it is in the process of seeking to obtain the video recording that reportedly exists with respect to Ms. Lopp's detention and arrest. *Id.*

1 credit card fraud.” Balogh Decl. Ex. B at WCSO 11.² Deputies Lenz and Brand “proceeded to
 2 assist Sioux City PD in locating the possible vehicle.” *Id.* Upon coming to the area of the credit
 3 union, Deputy Lenz reports as follows:³

4 we passed a silver SUV that was parked along the curb, directly
 5 across from the credit union. This vehicle had Wisconsin plates and
 was still running with one female occupant in the driver’s seat.

6 As we passed this vehicle, the driver appeared to become nervous and
 7 made a U-turn and headed back toward the credit union parking lot.
 Again, we passed her, a second time, still appeared [sic] to be nervous.

8 As we parked in the credit union parking lot, the silver vehicle began
 9 to drive away, heading west on 1st St., away from the credit union. We
 then initiated a traffic stop on this silver SUV at 1st and Westcott.

10 The driver of this vehicle became known to us as Barbara Lopp, she
 11 produced a paper California driver’s license and a few other
 miscellaneous papers in regards to the vehicle being a rental.

12 When asked what she was doing in town, from California, she told me
 13 she was here visiting her uncle. I asked her where her uncle lived,
 to which she continually stated she did not know.

14 She stated she was here with her brother, Michael Thomas, in which she
 15 first gave very little information about. Barbara’s story was not adding up
 and seemed very suspicious.

16 Deputy Brand then read Barbara her Miranda Rights, to which she
 17 acknowledged.

18 It was later found out that Michael Thomas was, in fact, not her brother,
 but she felt that Michael was her brother.

19 I asked her where Michael was and she stated she had dropped him off
 20 over there, to which she pointed in the direction of Gordon Dr.

21 I questioned her as to why she would drop him off in the middle of Sioux
 22 City, if they didn’t even know their way around, didn’t know where their
 uncle lived. She could not give me a straight answer as to why she
 dropped him off.

23 I asked her what Michael was wearing, to which, at first, she stated she did
 24 not know.

25
 26 ²For several reasons, including Deputy Lenz’s narrative reflecting that the subject vehicle
 27 was requested to be towed at 11:28 a.m., *see* Balogh Decl. Ex. B at WCSO 9, we understand Ms.
 Lopp’s detention and arrest to have transpired in the morning hours of February 12, 2015.

28 ³Although Deputy Lenz provided an abbreviated summary of these events, *see id.* at
 WSCO 10, we present his more detailed account for the Court’s consideration.

1 A little while later, I asked her the same question, again, and she stated
2 Michael was a tall black male and he was wearing a brown jacket. This
3 description she provided matched the description that Sioux City PD had
4 advised us of.

5 Sioux City PD was advised of the vehicle and suspect we had stopped
6 and a short time later Sioux City PD Officers Stroman, Harstad and
7 Lewis arrived and took Barbara into custody to be taken to the Sioux City
8 PD for further questioning.

9 Balogh Decl. Ex. B at WCSO 11-12.

10 The officers from the SCPD presented a somewhat different account. Beginning with
11 SCPD Officer Robert K. Johnson, he reported that at approximately 10:30 a.m. February 12, he
12 responded to the Municipal Credit Union to investigate “a black male subject inside the credit
13 union attempting to do a credit card advance.” *Id.* Ex. A at FBI 3560. He detained that
14 male—who identified himself as Davon Miller, and who later was determined to be Michael
15 Thomas—to conduct an investigation. *Id.* at FBI 3560-61. That investigation revealed (1) that a
16 check on the California driver’s license the subject provided came back with a different name
17 and address than the subject had provided; and (2) the bank manager reported that the subject
18 previously attempted a transaction at the bank. *Id.* at FBI 3560. Officer Johnson also reported
19 that another detective—Detective Nice, who was not on the scene—had “thought this was a
20 fraudulent situation because the subject attempted to go to several different credit unions or
21 banks in the Sioux City area attempting to get money this way.” *Id.* Officer Johnson detained
22 Thomas until SCPD detectives could arrive. *Id.*

23 With respect to Ms. Lopp, Officer Johnson reported as follows:

24 It should also be note [sic] that when I went outside Deputy Brand was in
25 the parking lot. He stated that there was a silver Chevy vehicle
26 parked on (I believe) 1st Street, just to the north of the bank,
27 facing west. He stated that the female driver was sitting in that
28 vehicle. It had Wisconsin plates on it, which links back to a rental
car company. He stated that female seemed like she was just sitting
there for no real purpose. Then a short time later she started to
drive away. *Deputy Brand asked if I wanted the vehicle stopped so we
could identify the driver. I advised him yes.* You would have to refer
to those officers’ dictations in reference to that female. It was later
determined that her name was Barbara Lopp and he [sic] was, in fact,
the driver for Miller.

Id. at FBI 3561 (emphasis added).

1 SCPD Detective Jeffrey Harstad also responded to the credit union after being called by
2 Officer Johnson. *Id.* at FBI 3561. When Officer Johnson called Detective Harstad, Officer
3 Johnson had already directed deputies Brand and Lenz to detain Ms. Lopp, and they had
4 accomplished that goal. *Id.* Upon arriving, Detective Harstad first investigated Thomas in the
5 credit union, before proceeding to the location where the officers had arrested Ms. Lopp. *Id.* at
6 3561-63. With respect to Ms. Lopp's arrest, Detective Harstad reported as follows:

7 Det. Lewis and I both went over to 1st and Westcott, where we met with
8 Deputy Brand. He and other deputy I do not know had stopped this
9 particular vehicle. According to Deputy Brand, this individual was
10 leaving from that particular area and this individual was named
11 Barbara Lopp. She was giving kind of a strange story to Deputy Brand
and was going on to explain that she had dropped this individual off
at that particular community credit union and did know what he was
doing; didn't know what he was wearing; so on and so forth. It just
appeared to be suspicious.

12 The plate in this was going to be Wisconsin #673-UXF. According to
13 her somebody had rented this particular vehicle by the name of Jason
14 Henderson, but he was not present and she did not know where he was.
15 She stated that she believed that he rented it or possibly Michael
16 Thomas. We asked who Michael Thomas was and she indicated that it
17 was the other gentleman that was over at the community credit union;
however that individual was going by the name Davon Miller. So, it
was kind of confusing as to who this individual was over at the
community credit union. He was going by Davon Miller; however
Barbara was telling us that it was Michael Thomas.

18 So at that particular time we explained to her that we needed her to
19 come down with us to the Sioux City Police Department and do an
20 interview. She was already Mirandized by Deputy Brand. Please see
21 his report for further details on the initial contact that he had with
22 her.

23 It should be noted that she was in possession of a large purse that
24 was brought with her and there were other miscellaneous item [sic]
25 throughout the vehicle in the back. In plain view you could see that
26 there were two suitcases or two bags that were full of items. We did
27 not go through the vehicle, we simply had it towed to the Sioux City
28 Police Department for a search warrant to be conducted on that.

Id. at FBI 3563.

29 Officer Zachary Lewis also responded to the credit union with Detective Harstad, and was
30 briefed by Officer Johnson regarding the black male's production of a driver's license that came
31 back with a different name and address than the subject had provided. *See id.* at FBI 3572. After

32 ////

1 directing Officer Johnson to transport Thomas to the police department, Officer Lewis addressed
2 the circumstances of Ms. Lopp's arrest, as follows:

3 Deputy Brand, and I believe he had a training deputy with him, had a
4 vehicle stopped that was involved in this. I talked with Brand on scene
5 initially. He said that she was denying that she had any involvement with
6 the male party in there and later said it was her brother. When I spoke
7 with her, Deputy Brand had already read her Miranda warning. I asked her
8 who that person was that she dropped off. She said it was her brother,
9 Michael Thomas.

10 It was determined that she would be going down to the Police
11 Department as well. She had a very large purse, as she called it, on
12 the front passenger seat. I had her hand me the keys. I had her bring
13 the purse with her. She was visually checked for weapons by Officer
14 Stroman and placed in the back of the squad car. I gave the keys to
15 Deputy Brand. They were going to tow the vehicle for us down to the
16 Police Department and put it in the bay so we could do a Search
17 Warrant. We called Aaron Liebe, DOT investigator, possibly for his
18 assistance. He came to the Police Department. Detective Thompson
19 assisted with writing a Search Warrant for the vehicle.

20 *See id.* at FBI 3573.

21 As shown, the SCPD and WCSO officers had neither a warrant nor sufficient other legal
22 cause to detain and arrest Ms. Lopp on the morning of February 12, 2015.

23 **III. Argument**

24 **A. The Fourth Amendment standards.**

25 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const.,
26 amend. IV. "As a general rule, searches conducted without a warrant and probable cause are
27 presumptively unreasonable, subject to a number of specifically established and well-delineated
28 exceptions." *United States v. Rambo*, 74 F.3d 948, 953 (9th Cir. 1996) (quotation marks
omitted). "The burden of proving that a warrantless search or seizure falls within an exception to
the warrant requirement is on the government." *United States v. Scott*, 705 F.3d 410, 416 (9th
Cir. 2012).

"Under the Fourth Amendment, government officials may conduct an investigatory stop
of a vehicle only if they possess reasonable suspicion: a particularized and objective basis for
suspecting the particular person stopped of criminal activity." *United States v. Twilley*, 222 F.3d
1092, 1095 (9th Cir. 2000) (quotation marks omitted). "Such reasonable suspicion requires
specific, articulable facts which, together with objective and reasonable inferences, form a basis

1 for suspecting that a particular person is engaged in criminal conduct.” *Id.* (quotation marks
 2 omitted) (emphasis added). All evidence resulting from an illegal detention, search, or seizure
 3 must be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471,
 4 487-88 (1963).

5 Similarly, the Fourth Amendment permits warrantless arrests where the government
 6 actors can demonstrate probable cause. “Probable cause for a warrantless arrest exists if under
 7 the totality of the facts and circumstances known to the arresting officer, a prudent person would
 8 have concluded that there was a fair probability that the suspect had committed a crime.” *United*
 9 *States v. Fixen*, 780 F.2d 1434, 1436 (9th Cir. 1986) (internal quotations and citation omitted).

10 **B. Application of the Fourth Amendment standards demonstrates the unlawfulness of**
 11 **the officers’ detention and arrest of Ms. Lopp.**

12 The February 12 stop fails under the applicable standards. Because the stop was
 13 conducted without a warrant, it is presumptively unreasonable, and no exception to the warrant
 14 requirement applies. So too, the officers had no legal cause—reasonable suspicion or
 15 otherwise—to seize Ms. Lopp on the morning of February 12. Instead, the *only* basis for the stop
 16 was to determine the identity of the driver, about whom the officers had no specific, articulable
 17 facts to demonstrate that she was engaged in criminal conduct. *See* Balogh Decl. Ex. A 3579
 18 (Sergeant Christopher Groves’s narrative: “They [the WCSO officers] also located a female
 19 party, it was a white female, sitting in a silver vehicle with Wisconsin plates, I believe it was a
 20 rental car, sitting somewhere in the vicinity. *When they went to speak to her, not knowing if she*
 21 *was involved or not*, she made some indication that she was waiting for the male party or
 22 something to that affect [sic], they believed that she was involved as the driver or had dropped
 23 this male party off.”) (emphasis added). More bluntly, the police have conceded that they lacked
 24 sufficient information to conclude that Ms. Lopp was then “a particular person . . . engaged in
 25 criminal conduct.” *See Twilley*, 222 F.3d at 1095.

26 Indeed, as set forth above, Deputy Brand directed the detention of Ms. Lopp based solely
 27 on the following facts: that there was a “female [who] seemed like she was just sitting there [in a
 28 vehicle] for no real purpose.” *Id.* at FBI 3561. At the time Deputy Brand directed the detention,
 all he and Deputy Lenz knew about Thomas’s conduct was “radio traffic on a male subject inside

1 of a credit union on S. Fairmont that *was possibly* committing credit card fraud.” *Id.* Ex. B at
2 WCSO 11 (emphasis added). But the officers did not know any facts to conclude that Thomas
3 had, in fact, committed a crime, and most certainly possessed no specific, articulable facts to
4 connect Ms. Lopp with any criminal conduct. At that point, the officers had no reason to believe
5 that Thomas was associated with anyone, much less Ms. Lopp; nor did they have any basis to
6 believe anything other than Thomas arrived at the credit union alone. Driving away from a credit
7 union, while obeying all traffic laws, did not provide any basis for the officers to detain Ms.
8 Lopp.

9 Under these circumstances, the enforcement stop violated the Fourth Amendment, *see*
10 *Twilley*, 222 F.3d at 1095, and the Court should enter an Order suppressing all evidence and
11 fruits of evidence obtained from the stop. *Wong Sun*, 371 U.S. at 487-88.

12 Next, assuming *arguendo* the Government can avoid the impact of the unlawful
13 stop—and it should not—the Court should still grant this motion on the alternative ground that
14 the officers arrested Ms. Lopp without probable cause. On this point, Ms. Lopp contends that
15 she was effectively under arrest at the time of the initial detention, but in any event, that
16 detention blossomed into an arrest no later than when Deputy Brand issued the *Miranda*
17 warnings.

18 Ms. Lopp agrees that no bright-line rule establishes when an investigatory stop becomes
19 an arrest. *See Green v. City and County of San Francisco*, 751 F.3d 1039, 1047 (9th Cir. 2014).
20 Rather, courts examine the totality of the circumstances to distinguish a stop from an arrest,
21 focusing on the perspective of the person seized rather than the subjective beliefs of the officers.
22 *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1176 (9th Cir. 2013). The question is
23 whether a reasonable person in the same circumstances would not have felt free to leave after
24 brief questioning. *Id.*

25 Courts look at two main components of the detention in looking at the totality of the
26 circumstances. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). First, courts assess
27 the intrusiveness of the stop, *i.e.*, the aggressiveness of the police methods and the extent of the
28 restrictions on the person’s liberty. *Id.* It is under this first component that courts assess whether

1 a reasonable person would have felt free to leave. *Id.* The second component is the justification
2 for the use of such tactics, viewed from the perspective of law enforcement. *Id.*

3 The duration of detention also weighs in determining whether a stop has become an
4 arrest. *United States v. Guzman-Padilla*, 573 F.3d 865 (9th Cir. 2009). And the Sixth Circuit
5 teaches that “[t]he reading of *Miranda* rights, while not dispositive, is also evidence that a stop
6 has become an arrest.” *United States v. Lopez-Medina*, 461 F.3d 724, 740 (6th Cir. 2006); *see*
7 *also United States v. Lopez-Arias*, 344 F.3d 623, 628 (6th Cir. 2003) (affirming district court’s
8 ruling that the subject was arrested, and noting that the reading of the rights made the seizure
9 “more like an arrest”).

10 In this case, Officer Johnson directed the detention of Ms. Lopp solely to obtain her
11 identity. *See* Balogh Decl. Ex. A at 3561 (“Deputy Brand asked if I wanted the vehicle stopped
12 so we could identify the driver. I advised him yes.”). But that event—in which Ms. Lopp
13 accurately identified herself to law enforcement, *viz.*, presented innocent conduct—took a minute
14 or less. But the officers did not release her then. Instead, the police reports demonstrate that the
15 officers detained and questioned Ms. Lopp for an extended period while the officers investigated
16 Thomas in the credit union.⁴ Put another way, upon being pulled over for no traffic violation, a
17 reasonable person in Ms. Lopp’s position would not have felt free to drive off after answering the
18 officers’ questions as to her identity. So too, the justification for her detention was nothing more
19 than a hunch that she might be connected to Thomas.

20 Ms. Lopp’s subsequent acknowledgment under questioning that she dropped off Thomas
21 does not change the analysis. Rather, even that connection does not establish that there existed
22 then “a fair probability that [Ms. Lopp] had committed a crime.” *See Fixen*, 780 F.2d at 1436.
23 Rather, as surmised by Detective Harstad, when Ms. Lopp admitted to dropping off Thomas,
24 because *Thomas* had given a fake name in the credit union, the officers were unsure about what
25 connection, if any, Ms. Lopp had to Thomas’s conduct, so they arrested her so they could sort it
26

27 ⁴The production of the video recording, which we expect presently based on the
28 correspondence with government counsel, *see* Balogh Decl. Ex. B & ¶ 2, should shed light on the
length of the officers’ restrictions of Ms. Lopp’s liberty.

1 out at the police station. *See* Balogh Decl. Ex. A at 3563. While the officers' hunches ultimately
2 proved correct, that's beside the point: at the time they arrested Ms. Lopp, the officers lacked
3 probable cause to secure her custody by arrest. As a result, the Court should issue an Order
4 suppressing all evidence, and the fruits of evidence, from Ms. Lopp's unlawful arrest.

5 **IV. Conclusion**

6 For the reasons set forth above, the Court should issue an Order declaring Ms. Lopp's
7 detention and/or arrest to have been accomplished in violation of her Fourth Amendment rights,
8 and suppressing all evidence, and the fruits of all evidence, obtained from the unlawful detention
9 and arrest.

10 Respectfully submitted,

11 DATED: January 21, 2016

COLEMAN & BALOGH LLP

12 */s/ E A Balogh*

13 By: ETHAN A. BALOGH
14 235 Montgomery Street, Suite 1070
15 San Francisco, CA 94104
16 Direct: 415.391.0441

17 Attorneys for Defendant
18 BARBARA JOAN LOPP
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PROOF OF SERVICE

I, Ethan A. Balogh, certify that on January 21, 2016, I served all parties in this matter by causing the preceding pleading to be filed electronically through the Court's ECF System, as set forth by Local Rule 5-1.

Dated: January 21, 2016

/s/ E A Balogh
ETHAN A. BALOGH